

PUBLIC DEFENDER: COSTS, ORGANIZATION, LAD AUDIT

A Report Prepared for the
Legislative Finance Committee

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PURPOSE

The purpose of this report is to provide the Legislative Finance Committee (LFC) with background information and an update, or status report, of the implementation of the new statewide public defender system authorized by the past legislature, with the primary focus of the report being funding and financially related issues. This report will also note some issues or concerns that may be considered during the next legislative session.

BACKGROUND

Legislation known as the Montana Public Defender Act (Senate Bill 146), passed and approved during the 2005 legislative session, created a statewide public defender system. This new statewide system is to be operational beginning July 1, 2006 (FY 2007). The Montana Public Defender Act (Act) was requested by the Law and Justice Interim Committee (LJIC) as a result of their research and study of public defender services in Montana. Under the process that exists through FY 2006, decisions about provision and funding of public defender services is determined by local governments. If local governments do not take action, the district court judge appoints a private attorney to act as a public defender on an ad-hoc, case-by-case basis.

Counties and other entities submit reimbursement requests for these costs to the Office of the Court Administrator (OCA) in the Judicial Branch. The OCA has little ability to control or deny reimbursement for bills that are submitted, although budgetary constraints (lack of funds) in some years have resulted in the OCA not reimbursing counties and other entities for allowable costs. Under the act the new public defender system¹ is a statewide centrally managed system with funding and oversight consolidated in one state entity.

This legislation was influenced to some degree by pending litigation filed by the American Civil Liberties Union (ACLU) regarding public defender service provision in Montana. In February, 2004 the ACLU filed a lawsuit against the state and seven counties. Among the lawsuit allegations was that Montana had failed to provide constitutionally and statutorily adequate legal representation to indigent adults with criminal cases pending.² The ACLU litigation questioned the adequacy of oversight and funding, and the quality of service provided. In May, 2004 the Attorney General and ACLU signed a stipulation placing this litigation on hold pending legislative action. During this time period the LJIC was in the process of studying the public defender system.

Also, in August, 2004 the National Legal Aid and Defender Association (NLADA) submitted an expert report assessing indigent defense services in Montana in the ACLU lawsuit case. The NLADA concluded that the provision of indigent defense services in Montana was unconstitutional in several respects. The NLADA report contained several statements (some of which are paraphrased below) including that:

- o Montana failed to adequately fund indigent defense
- o Montana's lack of funding means that public defenders are not afforded the same level of resources that are afforded the prosecution³

The report on the public defender system issued in December, 2004 by the LJIC included a number of recommendations to address items at issue in the ACLU litigation and NLADA report. Information considered by the LJIC and included in its report estimated the first biennium costs of the new statewide system to be about \$14.1 million, of which \$10.6 million was current spending by the state, the counties, and the cities and \$3.5 million was new spending; and that for each biennium after the new system becomes fully functional (on July 1, 2006), total biennial costs would be \$27 million, of which \$5.9 million would be new spending.⁴

In general, the purposes of the new statewide public defender system are to assure that indigent criminal defendants receive effective assistance of counsel, undue political influence does not exist, and quality services

¹ Both district courts and courts of limited jurisdiction are included in the new statewide system.

² For the Defense, A Report to the 59th Legislature by the Law and Justice Interim Committee, December 2004

³ Ibid

⁴ Ibid

are provided by competent counsel fairly and consistently throughout the state. The new system is charged with providing public defender services in all courts in this state, is supervised by a commission consisting of 11 members that are appointed by the Governor, and is administered by the Office of the Statewide Public Defender (OPD). The OPD is an Executive Branch agency that is administratively attached to the Department of Administration.

In addition to the statewide system, the act also moved responsibility for reimbursement for public defender services from the Office of the Court Administrator in the Judicial Branch to the OPD in the Executive Branch. As a result of the act, responsibility for the bulk of the so-called variable costs paid as a part of District Court Operations Program moves from the Judiciary to the OPD. The cost of the Appellate Defender Office also becomes a segment of the Public Defender System. Appendix A contains a chart prepared by the affected agencies summarizing various costs and whether they are the responsibility of the Office of Court Administrator or the OPD.

AUDIT AND ENTITLEMENT SHARE ADJUSTMENT

The act as passed funded the system from the general fund and reduced the entitlement share payment of local entities⁵ to offset the increased costs that were transferred from local to state funding. During the course of legislative action expenses incurred by counties but not reimbursed by the OCA became a concern. The act as passed provides for the audit⁶ of costs in Cascade, Gallatin, Lewis and Clark, Missoula, Flathead and Yellowstone Counties so that legislation may be prepared for the 2009 Legislature to refine the entitlement share adjustment for these counties. The LFC is specifically named in the legislation as one of the parties to be consulted in the preparation of this legislation. It is expected that the LJIC will forward a recommendation on this issue to the LFC for review and comment later this year.

LFA DUTY

The act specifies that the LFA for the fiscal year beginning July 1, 2011 and every five years thereafter, compare the percentage change in general fund revenue for the previous five years to the percentage change in the amounts allocated to local governments under the provisions of 15-1-121, MCA (as amended in 2005), and the actual costs for public defender services for the same time period. The results of this comparison are to be presented to the governor, LFC, LJIC and Supreme Court by September 1st of the following year.

FINANCIAL OUTLOOK

STRATEGIC PLAN

Staff of the OPD have prepared and the Public Defender Commission has adopted a strategic plan including organization structure, goals, infrastructure and FY 2007 through 2009 cost estimates for the system. The public defender system outlined in the strategic plan splits the state into 11 regions and proposes utilizing a combination of state offices and contracted services to provide services. In general, the plan provides services in population areas of the state via state staffed offices and in less populous portions of the state via contracted services. In addition to 11 regional offices, six county offices and one city office will become state offices effective July 1, 2006 and during FY 2007 five new public defender offices will be opened. Appendix B contains a table summarizing the location of various public defender offices. In several areas, the system shifts from contracted to state staff with funding being shifted in a similar fashion to achieve the proposed system configuration.

⁵ Under legislation passed in 2001, local governments agreed to relinquish dedicated revenues in exchange for an entitlement share of state general fund based upon a formula that responds to the performance of the state's economy.

⁶ "Public Defender Services in Six Selected Counties" dated March 2006 and numbered LAD report 06C-09.

SUPPLEMENTAL APPROPRIATION REQUEST

Figure 1 summarizes the legislative budget, and estimated costs and FTE for FY 2006⁷ through 2009 as projected by the OPD. As illustrated in the table, the OPD currently estimates a budget shortfall of \$3.3 million in FY 2007 based upon estimated costs of almost \$17 million. However, this projection does not reflect recent

Office of Public Defender Summary of Costs and FTE As Estimated by OPD Staff				
Item	FY 2006	FY2007	FY 2008	FY 2009
Legislative Appropriation	\$527,729	\$14,134,117	na	na
Projected Costs	593,816	17,394,162	\$16,282,859	\$15,979,495
Under (Over) Appropriation	(\$66,087)	(\$3,260,045)	na	na
FTE Per Budget	5.50	90.25		
FTE Proposed	4.75	175.75	192.75	192.75
Under (Over) Legislative	(0.75)	85.50	na	na

commission discussion⁸ regarding the minimum hourly rate to be paid for contracted public defender services.

At its May meeting the commission appeared to reach agreement and directed the contract manager to proceed with contracting policy including a change to the draft policy to include a minimum hourly rate of pay for contracted public defender services (attorneys) at \$60 per hour. The commission also discussed raising this minimum to \$80 per

hour. This varies from the current policy of the Office of Court Administrator which caps reimbursement at a maximum of \$60 per hour. While OPD staff indicate they believe most attorneys involved in district court cases are billing at the maximum \$60 per hour rate, attorneys involved in court of limited jurisdiction cases may not be. Estimates of the fiscal impact of this decision were not presented at the commission meeting. Given the commission's decision to establish a minimum hourly rate for contracted attorneys, it is likely that the need for a supplemental appropriation will increase above the level currently estimated.

Projected costs for the 2009 biennium decrease slightly due to one-time start-up costs that are not ongoing in nature. However, these estimates do not include the costs of any new initiatives or funding for increases in caseload that may be requested as part of the 2009 biennium budget.

Figure 2 summarizes funding needed to maintain services at the FY 2007 level and the items requested by the OPD in its Executive Planning Process (EPP) submission. If all of these items are included in the executive budget and approved by the legislature, 2009 biennium funding for public defender services would rise to over \$41 million for the biennium, with all but \$0.5 million supported by the general fund.

Office of Public Defender Summary of Executive Planning Process (EPP) Submission			
Item	FY 2008	FY 2009	Biennial
Current Level Operations	\$16,282,859	\$15,979,495	\$32,262,354
Increase in Caseload	2,000,000	2,000,000	4,000,000
Increase in Contracted Attorney Fees	1,157,813	1,068,359	2,226,172
Serious Crime Unit	394,437	367,737	762,174
Native American Case Workers	200,000	300,000	500,000
Fitness to Proceed Related Costs	<u>1,000,000</u>	<u>1,000,000</u>	<u>2,000,000</u>
Total All Items	<u>\$21,035,109</u>	<u>\$20,715,591</u>	<u>\$41,750,700</u>
Funding			
General Fund	\$20,835,109	\$20,415,591	\$41,250,700
Federal Funds	<u>200,000</u>	<u>300,000</u>	<u>500,000</u>
Total Funds	<u>\$21,035,109</u>	<u>\$20,715,591</u>	<u>\$41,750,700</u>

IMPLEMENTATION CONCERNS

The OPD has and continues to gear up for the July 1, 2006 implementation of the statewide system. Two of the major changes effective on that date are:

- Judges will no longer appoint an attorney to be the public defender for a case. Rather, the court will order the OPD to assign a public defender to the case

⁷ The OPD has requested of the Office of Budget and Program Planning that personal service contingency funds be made available to cover a portion of the FY 2006 shortfall of \$66,087.

⁸ OPD staff stated that their notes indicated the commission discussed this increase in minimum reimbursement rate but did not formally vote on the change. LFD staff in attendance at the commission meeting understood the commission reached an agreement and directed the OPD contract officer to proceed with proposed contracting policy that inserted \$60 per hour as the minimum hourly rate of reimbursement. LFD staff has requested a copy of the audio tape of this meeting to verify commission action on this issue.

- Financial responsibility for the costs of public defender services becomes the responsibility of a new executive branch state agency rather than being paid by the Judiciary Branch, Office of Court Administrator or a local government

Creation of a new state agency and the related infrastructure in a limited time frame such as the six or seven months that the OPD has before the new system must be prepared to accept clients, involves many steps and the development of many items including infrastructure, organizational structure, standards, policies, procedures, and rules that must be supported by staffing and technology.

As of the writing of this report the OPD has filled the positions of Chief Public Defender, Administrative Director, Financial Manager, Training Coordinator, Contract Manager, Information Technology Manager, Human Resources Manager, and 11 Regional Chief Public Defenders. It is currently recruiting for public defenders, brief writing and research attorneys, paralegals, investigators, and legal secretaries.

Office space has been located and leases are in progress for 13 of 17 offices. Office space has not yet been located in Polson, Lewistown, and Helena for the regional office, or Great Falls. Computer equipment and connectivity is being coordinated with office openings.

Implementation items that may be of concern include:

- Administrative rules – To date the OPD has not published any administrative rules for the agency. Staff of the OPD indicate that draft administrative rules are scheduled to be presented to the commission at its meeting in late June. Thus, it appears that administrative rules will not be in place by July 1, 2007
- Information technology and case management/data collection system – It is the OPD intent to continue utilization of existing systems (which vary by county) during FY 2007 while needs assessment and analysis is completed. The OPD plans to have selected and implemented a statewide and uniform case management system by the end of FY 2007. Due to concerns about loss of functionality of the entire system verses only portions of the system, the OPD has opted to continue to operate multiple servers rather than a centralized server as recommended by the Information Technology Services Division of the Department of Administration. The OPD information technology project has reached a level that triggers its inclusion in the Chief Information Officer's report to the LFC beginning in June, 2006.
- Contracting processes – While the act exempts the OPD from the Montana Procurement Act and specifies that contracts may not be awarded solely on the lowest bid or provide compensation solely on a fixed fee paid irrespective of the number of cases assigned, it does require that the OPD use a competitive bidding process for contracting for attorney services. The act states that the competitive process must at a minimum involve the following considerations:
 - Attorney qualifications necessary to provide effective assistance of counsel that meets the standards established by the commission
 - Attorney qualifications necessary to provide effective assistance of counsel that met the standards issued by the Montana Supreme Court for counsel for indigent persons in capital cases
 - Attorney access to support services, such as paralegal and investigator services
 - Reporting protocols and caseload monitoring processes
 - A process for the supervision and evaluation of performance
 - A process for conflict resolution
 - Continuing education requirement in accordance with the standards set by the commission

As of this writing the OPD has developed a survey and is requesting that individuals interested in contracting to provide public defender services complete and submit this survey. It is unclear what criteria will be used to evaluate these surveys, award contracts, and assign cases. Furthermore, action taken by the commission at its May meeting to establish a minimum hourly rate seems to limit the competitive nature of the bidding/contracting process. While the act specifies that contracts may not be awarded solely upon the cost estimate, it would seem appropriate to utilize the cost estimate as a factor in awarding contracts if all other qualifications and criteria are equal.

ISSUES FOR LFC CONSIDERATION

The following narrative identifies two issues the LFC may wish to consider.

SUPPLEMENTAL APPROPRIATION AND FUTURE FUNDING

It is likely that a request for supplemental funding will be requested from the 2009 Legislature. As mentioned previously, the OPD currently estimates a 2007 biennium funding shortfall of \$3.3 million (23 percent greater than the appropriation), not including additional costs that may be incurred as a result of the commission decision to establish a minimum hourly payment rate of \$60 per hour for public defender contract attorneys. Additionally, 2009 biennium funding for the system is currently estimated at \$32.3 million or 20 percent (more than \$5 million) greater than estimated by the LJIC in the committee's December 2004 report. Given the likelihood of a request for supplemental appropriation and estimates that costs are exceeding legislative estimates by 20 percent or more, the LFC may wish to:

- Encourage the OPD to take action to mitigate the projected supplemental appropriation need
- Provide the OPD comments regarding legislative views of the estimated cost overruns

CONTRACTING PROCESS

While the act exempted the OPD from the Montana Procurement Act (Title 18), it does require that a competitive bidding process be used by the OPD for contracting purposes and specifies a number of criteria that are to be considered in the contracting process. Currently available information raises questions and doubts about whether or not the OPD is utilizing a contracting process similar to that envisioned by the legislature as contained in the provisions of the act. If the procurement act is utilized as a guideline, one might expect that the process would include the following elements:

- A solicitation or request for bids that includes specification regarding qualifications and criteria that must be met by the contractor be issued
- A process and criteria for evaluating and scoring responses that is defensible in the event that the contracting process is challenged be developed
- Cost estimates be included in the bidders response and utilized as an evaluation criteria if all other factors are equal

The LFC may wish to:

- Request that the OPD provide the LFC an summary of the contracting process that will be utilized
- Encourage the OPD to utilize a contracting process that generally follows the concepts included in the Montana Procurement Act, even though the OPD is exempt from these requirements
- Comment upon the usage of bids or cost estimates as a factor in the awarding of contracts

SUMMARY

Implementation of the new statewide public defender system is progressing. Some steps have been completed and many are underway. However, some key components such as adoption of administrative rules and contracting processes are yet to be completed. Items such as the contracting process and hiring of staff for the various offices will be critical to making the transition and change in process as uneventful as possible. It will be necessary to carefully monitor activities on and after July 1 to make certain services are provided to clients in a timely and efficient manner.

From a financial point of view, it would seem likely that the OPD may seek a supplemental appropriation for the 2007 biennium. Current projections indicate a FY 2007 shortfall of about \$3 million. This combined with the FY 2006 shortfall for District Court Operations variable costs in the Judicial branch (\$3 million) suggest that the costs overrun for these services will be more than \$6 million for the biennium. Additionally, if requested funding increases are included in the executive budget and approved by the legislature, the biennial funding for public defender services would rise to more than \$41 million in the 2009 biennium compared to the \$27 million biennial costs estimated by the LJIC during its study of the public defender system.

APPENDIX A

Summary of Indigent Defense Costs Paid by State Public Defender Office and Office of the Court Administrator

Draft February 10, 2006

Category Activity	Circumstance of Special Condition	Who Pays It? SPD or OCA	Direct Pay or Reimbursement	Statutory Reference	Comments
Legal Counsel (except GAL appointments)		SPD			
Legal Counsel – Guardian Ad Litem		OCA			
Witness Fees and necessary expenses	If subpoenaed by prosecution in a criminal proceeding or grand jury or defendant pro se	OCA	Reimbursement to Clerk of Court	3-5-511; 3-5-901 (2) (b) (ii); 26-2-506 (2)(b) & (c); 46-15-116	
Witness Fees and necessary expenses	If defendant is represented by or witness is subpoenaed by SPD	SPD	Reimbursement to Clerk of Court	3-5-511; Section 7 (5) of SB 146; 26-2-506 (2)(a); 46-15-115	
Witness and Interpreter Fees	If requested by SPD	SPD	Direct or Reimbursement	Section 7 (5) of SB 146	
Transcripts	If a criminal case and requested by the Judge	OCA	Direct Pay to Court Reporter	3-5-604 (3) (a); 3-5-901 (1) (b) (i)	
Transcripts	If county attorney or attorney general request a criminal transcript	County Attorney or AG	Direct Pay	3-5-604 (3) (b)	Only the actual costs of preparation may be paid.
Transcripts	Judge requests in a civil case	No payment	NA	3-5-604 (c)	
Transcripts	County requests for civil transcript	County	Direct Pay	3-5-604 (d)	Only the actual costs of preparation may be paid.
Transcripts	Requested by SPD	SPD	Direct Pay	3-5-604 (4) (a)	
Transcripts	Requested by an indigent party eligible for public defender but acting pro se	OCA	Direct Pay	3-5-604 (4) (b)	
Juror Fees and Necessary Expenses		OCA	Reimbursement to Clerk of Court	3-5-901 (2) (b) (iii)	

Psychiatric Evaluations under 46-14-202 – PART I	if the issue of the defendant's fitness to proceed was raised by the district court or the examination was requested by the prosecution	OCA	Direct	46-14-202 (4) (a) (i)	
Psychiatric Evaluations under 46-14-202 – Part II	(ii) if the defendant was represented by an attorney assigned pursuant to the Montana Public Defender Act, [sections 1 through 4 and 6 through 14], and the examination was requested by the defendant or the defendant's counsel	SPD	Direct	46-14-202 (4) (a) (ii)	
Psychiatric Evaluations under 46-14-202 – Part III	if the defendant was represented by an attorney assigned pursuant to the Montana Public Defender Act, [sections 1 through 4 and 6 through 14], and the examination was jointly requested by the prosecution and defense counsel or the need for the examination was jointly agreed to by the prosecution and defense	OCA	Direct	46-14-202 (4) (a) (iii)	
Unfit-to-Proceed Under 46-14-221	If the court determines that a defendant lacks fitness to proceed	OCA	Direct	46-14-221 (4)	
SPECIFIC EXPENSES THAT ARE NOT PAID BY EITHER THE SPD OR THE OCA					
Expenses of Trial for Offenses Committed in Prison		Department of Corrections	N/A	53-30-110	
Pre-commitment psychiatric examination, detention, treatment and transportation		May be Respondent, parent, guardian, private insurance carrier, public assistance program or county	N/A	53-21-132	

APPENDIX B

Regional Office Locations	Existing County or City Offices	New Public Defender Offices
Kalispell	Missoula	Kalispell
Missoula	Lewis and Clark (Helena)	Polson
Great Falls	Deer Lodge (Anaconda)	Boulder
Helena	Yellowstone (Billings & Billings City Court)	Butte
Butte (and central office)	Cascade (Great Falls)	Hamilton
Bozeman	Gallatin (Bozeman)	
Havre		
Lewistown		
Billings		
Glendive		
Miles City		